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Supreme Court, U.S.
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No. 07-___

IN THE

Supreme Court of the United States

WALTER RUSSELL,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Illinois

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QUESTIONS PRESENTED

1. Whether a state supreme court's decision to arbitrarily deny a criminal defendant a state provided right of appellate review violates his due process rights under the Fourteenth Amendment?

2. Whether an erroneous jury instruction that misstates the law on evaluating witness identification testimony denies a criminal defendant due process under the Fourteenth Amendment when the only evidence that supports a conviction beyond a reasonable doubt is witness identification testimony?

PARTIES TO THE PROCEEDING

The Petitioner is Walter Russell. Respondent is the People of the State of Illinois.

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PETITION FOR CERTIORARI

Petitioner Walter Russell, respectfully petitions this Court for a writ of *certiorari* to review the decisions of the Illinois Supreme Court and the Appellate Court of Illinois ("First District").

OPINIONS BELOW

The First District's decision denying Petitioner's appeal is included at a-1. The Supreme Court of Illinois decision denying Petitioner's Motion for Leave to Appeal is included at a-36. The Supreme Court of Illinois's decision to deny Petitioner Leave to File a Motion to Reconsider is included at a-37. All the above decisions are unreported.

JURISDICTION

The Supreme Court of Illinois decision denying Russell's Petition for Leave to File an Appeal was entered on March 28, 2007. The Supreme Court of Illinois's decision denying Petitioner's Motion to Reconsider was entered on July 6, 2007. This writ is timely filed within 90 days of that denial. Sup. Court Rule 13(3).

PERTINENT CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment of the United States Constitution states as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

> enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Const. XIV.

I. STATEMENT OF THE CASE

A. The Underlying Events and Guilt Phase of the Trial

On January 27, 2004, Walter Russell was convicted of the July 19, 2000 murder of Aletra Slack and attempted murder of Raashawn Langford, Reginald Tracy, and Shivone Langford. His conviction was based entirely on circumstantial evidence derived from witness identification testimony.

During the early hours of July 19, 2000, Aletra Slack died of a single gunshot wound to her head. Earlier that evening, she was involved in a minor car accident when her friend, Raashawn Langford, backed his SUV into a parked van (hereinafter referred to as the "first accident") on the south side of Chicago. Russell, the Petitioner, and his friend, Gregory Craig, were sitting in the van when the SUV backed into it. Raashawn, claiming he saw Craig brandish a pistol, fled the scene of the accident and testified that the van pursued.[1]

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[1] Others claimed, including Craig, that they heard Russell ask for the pistol.

Shortly thereafter, someone fired at least one bullet into the SUV killing Slack. After the shooting, Raashawn lost control of the SUV and crashed it into a tree (hereinafter referred to as the "second accident"). Only one witness in the SUV, Shivone Langford, testified that she saw Russell and another man drive the van away from the second accident. Raashawn Langford and Reginald Tracy did not identify Russell during the lineup.

The police never recovered the weapon used to murder Slack, the van that followed the SUV, or any other forensics or physical evidence linking Russell to Slack's death. Moreover, the State of Illinois did not produce a single witness who saw Russell fire a gun at the SUV or saw the shot originate from the van. Russell's conviction was based entirely on circumstantial evidence derived from witness identification testimony which placed Russell at both the first and second accidents.

During the trial, the court incorrectly read jury Illinois Pattern Instruction 3.15 which lists the five factors that the jury should consider when evaluating witness identification testimony. Those factors are: (1) the witness's opportunity to view the offender; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the level of certainty demonstrated at the identification confrontation; and (5) the length of time between the crime and the identification. In Russell's case, however, the trial court improperly inserted the conjunction "or" between each of the factors thereby instructing the jurors that they could ignore any four of the factors in favor of only one. This Court has held that the jury should weigh the

relevant evidence in light of *all* five factors in the pattern instruction. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

Thus, the pivotal evidence in this case, that Russell was at both the first and second accidents, was tainted by the erroneous instruction. For example, only a single witness from the SUV, Shivone Langford, identified Russell at the second accident after Slack was shot. According to her testimony, just prior to the moment when she saw Russell, the SUV swerved and crashed into a tree. She crawled from the SUV and began to vomit. By her own account, she was "shaken" and "dazed." She then ran away from the SUV across a yard to a nearby house. These events all occurred at the same moment she also claimed Russell was one of the two people she saw drive away in a van. Yet, despite this obvious trauma, Shivone also claimed to be certain that Russell was the person she had seen.

As a result of the trial court's error, each juror could have improperly found Russell guilty without considering any evidence other than Shivone's certainty that she identified the correct person rather than taking into account all five of the factors set forth in the pattern instruction.

B. First District and Supreme Court of Illinois Proceedings

In Illinois, this specific error has been the subject of substantial jurisprudence. As early as 2005, the Supreme Court of Illinois held a "plain error" occurs whenever Illinois Pattern Instruction 3.15 is read by the trial court with the "ors." *People v. Herron*, 215 Ill.2d 167, 191, 830 N.E.2d 467 (Ill. 2005). Under

Illinois law, where a plain error occurs during trial, a defendant is entitled to a new trial if he persuades the court that the evidence is "closely balanced." According to Illinois law, evidence is "closely balanced" when a jury's guilty verdict may have resulted from the error and not the evidence. *Id.*

Citing both the Fourteenth Amendment of the U.S. Constitution and Supreme Court of Illinois precedent on this specific issue, Russell argued in his appeal to the First District that he was denied due process and a fair trial because the jury could have convicted him without considering exculpatory evidence.[2] Russell also argued that the totality of the evidence was insufficient to support a guilty verdict beyond a reasonable doubt. Despite the lack of any forensic, physical, confessional, or other direct evidence that Russell was involved in Slack's death, the First District affirmed Russell's conviction.

Dealing with the sufficiency of evidence issue first, the First District held that the evidence was sufficient to support a conviction beyond a reasonable doubt. It based this conclusion on witness identification testimony that placed Russell at both the first and second accidents. The First District specifically cited to Shivone Langford's

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[2] Russell also argued that the identification should have been suppressed because Russell was arrested without probable cause and the lineup was unconstitutionally suggestive. He also argued that the jury was improperly given an accountability instruction. Russell, however, is not appealing these issues to this Court.

testimony to establish that a jury could find Russell guilty of Slack's murder.

With regard to the jury instruction error, the First District held that because "there was sufficient evidence presented at trial to find Russell guilty...we cannot say that the evidence was closely balanced or that the outcome of this case would have been different had the instruction not included the 'ors.'" a-32; *People v. Walter Russell*, No. 00 CR 19109, slip. op. at 28 (Ill. App. Ct. Nov. 30, 2006), The First District did not provide any further elaboration on this important issue.

Following this decision, Russell Petitioned the Supreme Court of Illinois for Leave to File an Appeal. Russell argued the First District wrongly considered evidence that was tainted by the erroneous jury instruction in its "closely balanced" calculus thus denying him due process under the Fourteenth Amendment. Nonetheless, on March 28, 2007, the Supreme Court of Illinois denied Russell's Petition. a-36.

On May 24, 2007 – less than two months after denying Russell's Petition for Leave to Appeal – the Supreme Court of Illinois issued its decision in *People v. Piatkowski*, 870 N.E.2d 403 (Ill. 2007). In *Piatkowski*, a case with facts strikingly similar to Russell's, the Supreme Court of Illinois reversed the defendant's conviction and ordered a new trial. Notably, the Supreme Court of Illinois held that "[w]hether the evidence is closely balanced is, of course, a separate question from whether the evidence is sufficient to sustain a conviction on review against a reasonable doubt challenge." *Id.* at

411. Indeed, the Supreme Court of Illinois went so far as to hold that the evidence presented against the *Piatkowski* defendant was sufficient to sustain a defendant's conviction but *not* closely balanced. Accordingly, it ordered a new trial.

On June 22, 2007, Russell filed a Motion for Leave to File a Motion to Reconsider Denial of Leave to Appeal in Light of [the Supreme Court of Illinois's] Decision in *People v. Piatkowski, and a* Motion to Reconsider. In the substantive motion to reconsider, Russell claimed that the First District's analysis of the witness identification jury instruction error was improper given that the First District affirmed his conviction with reasoning explicitly rejected by the Supreme Court of Illinois. As alternative relief, Russell requested the Supreme Court of Illinois to remand his case to the First District for reconsideration in light of *Piatkowski*. On July 6, 2007, the Supreme Court of Illinois denied Russell's Motion for Leave in its entirety and without explanation. a-37. To date, the facts of Russell's appeal have not been considered under the *Piatkowski* framework.

II. REASONS FOR GRANTING THE PETITION

This case gives the Court an opportunity to resolve two questions of fundamental importance to the criminal justice system.

First, the Court has the opportunity to revisit and clarify the scope of its decision in *Hicks v. Oklahoma*, 447 U.S. 343 (1980). *Hicks* holds that a state provided right, even procedural, cannot be arbitrarily denied by that state without affronting a

criminal defendant's constitutional protected right to due process under the Fourteenth Amendment. Whereas in *Hicks*, this Court dealt with a criminal defendant's state right to a jury imposed criminal sentence, this case presents the Court with an opportunity to protect a criminal defendant's right to a constitutionally valid appellate review.

The State of Illinois provides for the right to appeal a criminal conviction to correct errors that occurred during trial. The Supreme Court of Illinois explicitly stated that the type of analysis employed by the First District when it held that the evidence in Russell's case was "closely balanced" was improper yet has refused to cure the error. By granting this petition, this Court has the opportunity to clarify the degree to which irrational and arbitrary state court decisions are entitled to deference from federal courts.

Russell respectfully submits that Supreme Court of Illinois's refusal to reconsider its denial of Russell's Petition for Leave to File an Appeal, or at the very least, remand his appeal for reconsideration in light of *Piatkowksi*, constitutes an arbitrary and capricious deprivation of due process. Like Hicks, Russell seeks relief in the form of a prohibition against a state appellate court from acting irrationally and unjustly by denying him appellate relief, and in Russell's case specifically, without any explanation whatsoever.

Second, this case presents the Court with an opportunity to clarify under what circumstances an erroneous jury instruction denies a criminal defendant due process under the Fourteenth

Amendment. In this case, the trial court fundamentally misstated the law on witness identification testimony by erroneously instructing the jury that it could ignore four of the five factors that this Court has explicitly stated must be weighed when considering its verdict.

Thus, Russell respectfully submits that where, as here, the only evidence that supported a conviction beyond reasonable doubt was witness identification testimony, and the jury instruction that related to that evidence was tainted, the error was prejudicial. As a result, Russell seeks relief from this Court and asks that his conviction be reversed and a new trial ordered.

A. This Court Should Grant the Petition To Clarify The Scope of the Fourteenth Amendment's Due Process Protection Against Irrational and Arbitrary State Appellate Court Decisions

The Supreme Court of Illinois has explicitly stated that where IPI 3.15 is read to the jury with the "ors," the facts supporting the conviction must be evaluated to determine if they are "closely balanced." According to the Supreme Court of Illinois, this analysis is not the same as an inquiry into whether the evidence was sufficient to support a conviction beyond a reasonable doubt. Yet, the Supreme Court of Illinois refuses to consider Russell's appeal in this light, and has never provided any explanation.

On numerous occasions, this Court has held that the Due Process Clause prohibits the state from acting arbitrarily or irrationally when considering criminal appeals. *Evitts v. Lucey*, 469 U.S. 387

(1985) (holding that state practice violated due process because "it decided the appeal in a way that was arbitrary with respect to those issue involved); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (holding that "[s]uch an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law."); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (holding that "]t]he touchstone of due process is protection of the individual against arbitrary action of government").

Specifically, in *Hicks*, this Court held that a petitioner was entitled to an appellate review that was not based on an arbitrary and capricious reasoning. In *Hicks*, the petitioner, convicted of a charge of unlawfully distributing heroin, was sentenced to a mandatory 40 year prison term in accordance with Oklahoma's habitual offender statute. Subsequent to this conviction, the Oklahoma Court of Criminal Appeals declared the habitual offender statute unconstitutional. On appeal to the Court of Criminal Appeals, the petitioner sought to have his 40 year sentence set aside in view of the unconstitutionality that statutory provision. Acknowledging that the provision was unconstitutional, the Court of Criminal Appeals nonetheless refused to set aside the sentence. It reasoned that the petitioner was not prejudiced by the impact of the invalid statute since his sentence was within the range of punishment that could have been imposed in any event.

Like *Hicks*, Russell asks this Court to step in when the state court refuses to fulfill its appellate obligation. Although *Hicks* dealt with a petitioners right to have a jury impose his sentence, the key

issue is whether the State fulfills its obligation to treat each appellant individually and with deliberation. *See also Parker v. Dugger*, 498 U.S. 308, 321(1991) (noting that "what is important...is an individualized determination on the basis of the character of the individual and the circumstances of the crime").

In *Hicks*, the Oklahoma Court of Criminal Appeals based its denial of the petitioner's request to set aside his conviction "simply on the frail conjecture that a jury might have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision." *Hicks*, 447 U.S. at 346. In response to this reasoning, this Court held that "[s]uch an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law." *Id.*

Unlike *Hicks*, however, the Supreme Court of Illinois has never explained why Russell is not entitled to individualized and reasoned review of his appeal. The Supreme Court of Illinois has gone so far as to refuse to remand Russell's appeal to the First District for reconsideration even though it implicitly acknowledges that the analysis in which the First District engaged was insufficient as a matter of law. To date, Russell's claim that he has been denied a fair trial has been disposed of without the level of consideration the Supreme Court of Illinois requires. Regrettably, it has done so without any explanation.

Further, this Court recognized in *Hicks* that where "a State has provided for the imposition of criminal punishment in the discretion of the trial

jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law." *Id.* The Court continued "[t]he defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion...and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Id.*

Russell's petition to this Court is not precluded on procedural grounds. Although Russell does not have a constitutional right to appeal his conviction, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution-and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey,* 469 U.S. 387, 401, 105 S.Ct. 830, 839 (U.S. 1985).

Whereas Hicks had the legitimate expectation that a jury would decide his sentence, Russell has an equal expectation that his appeal would be considered in light of all relevant law. By permitting Russell to engage in the appeals process, the State of Illinois is obligated to not treat him in an arbitrary or capricious manner. The Supreme Court of Illinois has a constitutional obligation to consider Russell's appeal fairly. Its failure to reconsider Russell's claims in light of *Piatkowski*, or at a minimum, remand it to the Appellate Court, reveals an unconstitutional disregard for Russell's individual case and a denial of due process.

B. The Erroneous Jury Instruction Denied Russell Due Process by Rendering His Trial Fundamentally Unfair.

Russell has argued throughout his appeal, and reiterates that claim here, that the erroneous jury instruction on witness identification testimony deprived him of due process under the Fourteenth Amendment by rendering his trial fundamentally unfair. The jury instruction on witness identification testimony, as it was given at the conclusion of his trial, implied to the jury that it could ignore all exculpatory evidence and focus only on evidence that suggested guilt. Where, as is the case here, the conviction turns on the credibility of a witness, and the jury instruction that relates to the evaluation of that witness's testimony is tainted, so too must be the conviction.

In *Neil v. Biggers*, this Court held that the "factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainly demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

Based on the factors enumerated in *Neil*, the Illinois Supreme Court Committee on Pattern Jury instructions in Criminal Cases developed IPI 3.15 which instructs the jury on evaluating witness identification testimony. *People v. Gonzalez*, 761 N.E. 2d 198, 206 (1st Dist. 2001). On numerous

occasions, Illinois trial courts have read the instructions incorrectly by using the word "or" between each factor, as opposed to joining the list of factors with the word "and." The obvious effect of this error is "to imply, as a matter of law, that the identification testimony of an eyewitness may be deemed reliable if just one of the five factors listed weighs in favor of reliability." *Id.*

The Supreme Court of Illinois has held that the reading of IPI 3.15 with the "ors" is reversible error if the evidence is "closely balanced." *People v. Herron*, 830 N.E.2d 467 (Ill. 2005). The Supreme Court of Illinois noted in *Herron* that the "seriousness of the risk depends upon the quantum of the evidence presented by the State against the defendant." *Herron,* 830 N.E.2d at 483. The Court added that it dealt with "probabilities, not certainties" and "with risks and threats to the defendant's rights. When there is error in a close case, we choose to err on the side of fairness, so as not to convict an innocent person." *Id.*

In *Herron,* the Supreme Court of Illinois reversed the conviction of the defendant because only one witness could identify the defendant as one of the robbers. *Id.* As a result, the case "turned on the credibility of the [witness] identification, and the erroneous jury instruction involved how the jury should weigh such identification testimony." *Id.* The Court added the "effect of the error was not uncertain. The defendant proved that the trial court's error in reading IPI 3.15 with the "ors" was prejudicial. The jury's verdict may have been different with a different instruction." *Id.*.

Furthermore, the Supreme Court of Illinois recently reversed a conviction where "the case turned on the credibility of the witnesses' identification testimony and the erroneous instruction involved how the jury would weigh and evaluate such identification testimony." *People v. Piatkowski* 870 N.E.2d 403, 413 (Ill. 2007). The Supreme Court of Illinois added that "[w]hile we do not mean to imply that a new trial is required in every case where this particular erroneous-identification instruction is given and the only evidence against defendant is identification testimony, we believe that a new trial is required under the totality of the circumstances." *Id.*

At the conclusion of Russell's trial, the court instructed the jury on how to evaluate witness identification testimony by giving IPI 3.15. Like several trial courts before it, Russell's instruction also included the "ors." The effect of this instruction was to imply that exculpatory evidence could be ignored as a matter of law. In reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence, this Court asks whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. *Calderon v. Coleman*, 525 U.S. 141, 144-45 (1998); *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Boyde v. California*, 494 U.S. 370, 380 (1990).

Although an unconstitutional jury instruction alone does not entitle defendant to automatic reversal of his conviction, the conviction should be overturned where the error prejudiced the defendant. *Neder v. United States*, 527 U.S. 1, 8

(1999); *Chapman v. California*, 386 U.S. 18, 22 (1967). Thus, when this Court considers a constitutional error in a state proceeding on direct review, the error will be deemed harmless "if the beneficiary of the error proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Connecticut v. Johnson*, 460 U.S. 73, 81-82 (1983); *Chapman*, 386 U.S. at 24.

Moreover, this Court reviews the record *de novo* to determine whether a constitutional error is harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991). In Russell's case, the erroneous jury instruction necessarily affected the manner in which the jury would weigh the single most important piece of evidence presented against Russell. Only one witness, Shivone, identified Russell at the crime scene. At the time she claims to have seen Russell, Shivone was escaping from a SUV that had just been involved in an accident. She began to vomit. She was "shaken" and "dazed" and running away from the scene.

If Russell's jury applied the witness identification instruction literally, as the trial court gave it, it could have ignored all the exculpatory facts noted above and convicted Russell solely because Shivone Langford expressed certainty that Russell was a person at the second accident. *See Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316, 329 (1990) ("the proper inquiry ... is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of

constitutionally relevant evidence"). As a matter of law, therefore, this error prejudiced Russell because his conviction is not based on all the relevant evidence.

Furthermore, no other evidence suggests, beyond a reasonable doubt, that Russell committed this crime. Russell did not confess to the crime, the state did not produce any forensics evidence that linked Russell to the crime, and there is no other independent evidence that directly points to Russell. *See People v. Sims*, 358 Ill.App.3d 627 (1st Dist. 2005) (noting that the evidence was not closely balanced because the defendant's confession was presented to the jury), *People v. Gonzalez*, 326 Ill.App.3d 629, 639 (1st Dist. 2001) (noting that where a case is largely built on circumstantial evidence witness identification testimony, without any physical evidence, a jury may believe that "the presence of evidence supporting only one of the five factors" is a sufficient basis to determine that a witness's testimony is reliable...thus, where an "instruction as given may have mistakenly led the jury to rely on but a single factor when deciding that the identification testimony presented was reliable," the error is prejudicial and can overcome even the highest stand of plain error). Finally, two of the other passengers in the SUV, including the driver, could not identify Russell.

The erroneous jury instruction denied Russell due process by rendering his trial fundamentally unfair. Specifically, the only evidence connecting Russell to Slack's death was witness identification testimony that placed him at the scene of the crime, and the erroneous instruction permitted the jury to

ignore evidence that suggested that the identification was unreliable.

CONCLUSION

This case presents this Court with a vehicle for clarifying the scope of important Fourteenth Amendment jurisprudence. At minimum, this Court is empowered to ensure that a citizen of Illinois is not arbitrarily denied his right to have his criminal appeal fully heard and considered by the Illinois appellate courts. For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Appellate Court Order **a-1**

Supreme Court of Illinois Order Denying Petition for Leave to Appeal **a-36**

Supreme Court of Illinois Order Denying Motion for Leave to File Motion to Reconsider **a-37**

Notice
The text of this order may be Changed or corrected prior to the t6ime for filing of a Petition for Rehearing or the disposition of the same.

Fourth Division
November 30, 2006

No. 1-04-0853

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee	)	Appeal from the Circuit Court of Cook County
v.	)	No. 00 CR 19109
WALTER RUSSELL, Defendant-Appellant	)	Honorable Thomas J. O'Hara Judge Presiding

ORDER

The defendant-appellant, Walter Russell, was indicted and charged with the murder of Aletra Slack, and the attempted murders of Raashawn Langford, Reginald Tracy, and Shivone Langford. Following a jury trial; Russell was convicted of all charges and he was sentenced to concurrent prison sentences of 30 years for murder and three 15-year terms for the attempted murders. On appeal, Russell presents the following issues for review: (1) whether the trial court erred when it denied the motion to

suppress his identification; (2) whether the State proved Russell guilty of murder and attempted murder beyond a reasonable doubt; (3) whether the trial court erred when it gave I.P.I. Criminal 3.15 to the jury and read the bracketed word "or"; and (4) whether sufficient evidence was presented for the trial court to give the jury the accountability instruction.

BACKGROUND

During the early morning hours of July 19, 2000, Raashawn Langford was driving an SUV with three passengers, Aletra Slack, Reginald Tracy, and Shivone Langford. Raashawn backed his SUV into and hit Russell's van. Raashawn fled the scene of the accident, and Russell chased the SUV in his van and fired a handgun into that vehicle. During the course of the car chase and shooting, Aletra Slack was shot and killed. The car chase ended when Raashawn crashed his SUV into a tree at 120th and Wentworth Avenue in Chicago. Russell left the scene of the accident. Gregory Craig, a passenger in Russell's van, was arrested and provided a statement to the Riverdale Police Department and he identified Russell as the driver of the van. On July 20, 2000, a detective went to Russell's mother's home, and told her that the police were looking for Russell. Subsequently, Samuel Adam, Jr., Russell's attorney, contacted the Riverdale police, and told the police that he represented Russell and that he would bring Russell in for questioning. On July 21, 2000, Adam and Russell went to the Riverdale Police Department and Russell surrendered. At that time, Russell was arrested and subjected to a police lineup. On August 1, 2000, Russell was indicted for the murder of Aletra Slack and the attempted

murders of Raashawn Langford, Reginald Tracy, and Shivone Langford.

The Motion to Suppress

On January 7, 2002, Russell filed a motion to suppress identification. Russell argued that he was denied his Sixth Amendment right to counsel and that the police lineup was unconstitutionally suggestive. The trial court heard testimony and oral arguments on the motion.

LaToya Higgenbottom

LaToya Higgenbottom testified that on July 21, 2001, at 1:00 p.m., she viewed a lineup at the Riverdale Police Department. Higgenbottom sat in a hallway for fifteen minutes at the police department with three other witnesses prior to viewing the lineup or being interviewed by the police. Higgenbottom testified that nobody in the hallway was talking during that time. Each witness was called from the hallway to individually speak with the police. Higgenbottom testified that she spoke to the police prior to viewing the lineup and told them what she observed and then viewed the lineup. Higgenbottom testified that a detective escorted her to the lineup room, told her to look, to pick out a number, and that the detective then left the room that she was in, Higgenbottom testified that she identified Walter Russell as a person she saw at the 136th Street accident. Higgenbottom testified that all of the men in the lineup were holding the numbers the same way, that she did not pay attention to whether all of the men were the same height or what clothing they were wearing, if they were dark or light skinned, and that all she looked at was their faces. On cross-examination,

Higgenbottom testified that none of the police officers told her who to pick out of the lineup, that she never saw any police officers in the lineup room with the men in the lineup, and that it took her five seconds to identify Russell in the lineup.

Towanda Washington

Towanda Washington also viewed the lineup at the Riverdale Police Station. Washington testified that when she arrived at the police station, she waited in a hallway with other witnesses. Washington testified that a detective took her to a small room, and she looked through a small window and saw five or six black males in the room. Washington did not recall what clothing the men in the lineup were wearing or what their heights were. Washington testified that they were all holding numbers toward the center of their bodies. Washington testified that the detectives did not speak to her during the lineup. Washington identified Russell as the person she saw at the 136th Street accident. During cross-examination, Washington testified that no police officer told her who to pick out of the lineup and no one signaled to her about who to pick. She also testified that while she was viewing the lineup, she did not see any police officers go into the lineup room.

Shivone Langford

Shivone Langford testified that she went with her husband, Raashawn Langford, to the Riverdale Police Station and that after being interviewed by detectives, she viewed a lineup. Shivone testified that when she viewed the lineup, she went alone into a small room and that the officer told her to identify the person, if she could. Shivone testified that she

saw men sitting on a bench, holding numbers in front of them. Shivone could not recall if any of the men in the lineup adjusted their numbers at any time. Shivone testified that the officer did not speak to her while she was viewing the lineup. Shivone also testified that she identified Russell as a person she saw at the Wentworth accident, and also that she recognized the person in the number five position in the lineup as someone that she knew from the neighborhood.

Detective Rolniak

Detective William Rolniak, Jr. testified that he was assigned to investigate the death of Aletra Slack, and that on July 21, 2000, he interviewed some witnesses and provided Sergeant Satriano with photos of Russell that were contained in the department records from previous arrests. Detective Rolniak also testified that at approximately 9:00 a.m. on July 21st, Russell and his attorney, Samuel Adam, Jr., appeared at the Riverdale Police Station and that Russell was immediately arrested, processed, and booked. Detective Rolniak testified that he never spoke with Adam. Detective Rolniak stated that he received a written form signed by Russell and Adam indicating that Russell wanted his attorney present for any pre-charging lineups. Detective Rolniak testified that Sergeant Satriano attempted to contact Adam to determine if he wanted to be present for the lineup. Detective Rolniak testified that the lineup was conducted four or five hours after he received the form from Russell's attorney because they waited for all of the witnesses to arrive. The following seven witnesses viewed the lineup: Tiffany Rogers, LaToya Higgenbottom, Towanda Washington, Shivone

Langford, Raashawn Langford, Robyn Reynolds, and Reginald Tracy. Detective Rolniak testified that he spoke with all seven witnesses before beginning the lineup. Detective Rolniak testified that he brought each witness into the room to view the lineup and that all of the witnesses who were to view the lineup were separated. Detective Rolniak told each witness the same information about viewing the lineup, and he also testified that Russell never indicated to him that he wanted to have his attorney present for the lineup.

On cross-examination, Detective Rolniak testified that Russell was allowed to select his own number in the lineup, that all of the participants in the lineup were seated, that they were all black, that some were shorter and weighed less and some were taller and weighed more than Russell. Detective Rolniak testified that six people, including Russell, participated in the lineup, and that Russell was five feet, eleven inches tall and 270 pounds. Detective Rolniak testified that of the other participants in the lineup, three were six feet tall, one was five-foot-ten, and another was six-foot-five, and one weighed 205 pounds, two participants weighed 215 pounds, one was 220 pounds, and another participant was 330 pounds. Detective Rolniak also testified that Higgenbottom, Washington, and Shivone were able to identify Russell in the lineup. Detective Rolniak also testified that after a witness viewed the lineup, they were brought back to the room or the hallway that they had waited in before the lineup and that officers were present to ensure that nothing was said by the witnesses.

Sergeant Satriano

Sergeant Peter Satriano testified that he interviewed witness Gregory Craig and that Craig told him that the person who killed Aletra Slack had the nickname "man", was either a police officer or a jail guard, and drove a van. Sergeant, Satriano testified that Russell's attorney, Adam, called him on July 20th and told him that he would surrender Russell at the police station. Sergeant Satriano testified that he did not speak to Adam at the police station and he was not present during the lineup.

Lieutenant Amsden

Lieutenant Dan Amsden of the Riverdale Police Department testified that he photographed the lineup. Lieutenant Amsden testified that he took the photo of the lineup in the police garage after the lineups were conducted. Lieutenant Amsden did not recall if any of the participants in the lineup dropped their number during the lineup. Lieutenant Amdsen testified that police normally talk directly to a suspect while the lineup was being conducted if he dropped his number from under his chin.

Walter Russell

Russell testified that his attorney, Adam, and he signed a form indicating that he wanted his attorney to be present during any pre-indictment lineups or show-ups. Russell testified that Adam took the agreement into the Riverdale Police Department for a detective to sign and that when he next saw the agreement, Detective Rolniak's signature was on it. The agreement was written on Samuel Adam's attorney-letterhead and it was

signed by Russell, Adam, and Detective Rolniak. The agreement provided as follows:

> "I, ATTORNEY SAMUEL ADAM, represent WALTER RUSSELL regarding the shooting on July 19, 2000. MR. RUSSELL exercises his 5th Amendment right under the United States Constitution to remain silent, and does not wish to speak to any law enforcement official in any capacity about the events of July 19, 2000 without his legal counsel present. This letter serves as notice to all law enforcement that MR. RUSSELL is exercising his right to silence and his right to an attorney. Furthermore, MR. RUSSELL, demands that his attorney, SAMUEL ADAM, be present for any and all pre-indictment or pre-charging lineups, show-ups, and/or similar methods of identification. "

Russell testified that once the form was signed, he was taken in the back, fingerprinted, his photograph was taken, his shoes were taken away, and he was put into a cell. Russell testified that he was in a cell for three or four hours when he was then taken to a lineup. Russell testified that he asked where his attorney was and he asked to make a phone call, but Detective Rolniak told him that he could not make a call at that time and that he could not refuse to participate in the lineup. Russell testified that he was given numbers to choose and that he chose to be number three in the lineup. Russell testified that Detective Rolniak and Lieutenant Amsden were involved in the lineup process and that Sergeant

Satriano stood in the doorway of the lineup room. Russell testified that although he could not see through the ten-by-ten inch window, he could see the viewer's shape and a shadow when they were looking though the other side. Russell also said that they sat for the lineup and were told to hold the number cards up under their chins with one hand. Russell testified that during the lineup, his number was coming down and Sergeant Satriano told him to hold it up. On cross-examination, Russell testified that at the time of his arrest, he weighed approximately 270 pounds and stood five feet eleven inches tall, and that there were at least two or three other participants that were about his size in the lineup.

Stipulation

Next, the parties stipulated that if attorney Samuel Adam, Jr. were called to testify, he would have stated that on July 20, 2000, he called the Riverdale police and asked if they were trying to locate Russell. Adam would have also testified that he told the Riverdale police that he would surrender Russell to them the following morning. Adam would have also testified that when he arrived with Russell at the Riverdale Police Department on the morning of July 21st, he told the detectives that he did not wish for any officer or detective to question him about the murder investigation of Aletra Slack, and he also requested to be present for any and all pre-charging lineups. Adam would have also testified that he provided the detectives with a written form indicating those requests and that he also left several telephone numbers where he could be reached. Adam would have testified that he did not receive any phone calls or messages informing him that Russell was going to be put into a lineup.

Trial Court's Ruling & Motion to Reconsider

On January 10, 2003, the trial court denied Russell's motion to suppress the identification. The trial court found that Russell was not denied a right of counsel because the Sixth Amendment does not arise until after the defendant has been indicted or formally charged. With regard to the suggestiveness of the lineup argument, the trial court relied heavily on the photograph taken by the Riverdale Police just prior to the lineup. The court found that the difference in weight was not suggestive. The trial court also found that raising or lowering one's number was not suggestive because the witness viewing the lineup would "clearly think that maybe this person was not well trained and probably is one of the ringers in the lineup. " Thus, based on the totality of the circumstances, the trial court denied the motion.

Russell moved for the court to reconsider his motion to suppress. The trial court heard arguments and a stipulation from Samuel Thomas, a participant in the lineup. It was stipulated that if Thomas had been called to testify at the hearing, he would have testified that he stood next to Russell in the lineup and that Detective Rolniak received a message on his radio during the lineup telling him to make Russell sit up and hold his number up. Thomas would have also testified that none of the other participants in the lineup were spoken to or had their numbers moved during the lineup. Thomas would have testified that he saw the shadows and shapes of people looking through the window when Russell was told to hold his number up. On May 23, 2003, the trial court denied Russell's motion to reconsider, finding that there was not

enough evidence to establish that the lineup was suggestive.

The Trial

At trial, the State presented the testimony of the following witnesses: Bruce Fairfield, Aletra Slack's stepfather, Dr. Mitra Kalekar, a Cook County Medical Examiner; Gregory Craig, LaShanda Robinson; Towanda Washington; Reginald Tracy; Shivone Langford; Raashawn Langford; Lynne Russell, Walter Russell's mother; Detective Darrell Shaw, of the Chicago Police Department; and Detective Peter Satriano, of the Riverdale Police Department. The Defense called two witnesses: Stella Bailey and Samuel Adam, Jr. Only testimony relevant to this appeal has been included in this order.

The State's Case

Gregory Craig

Gregory Craig, Russell's friend of four to six years, testified that he was with Russell on the night of July 19, 2000, and he rode with Russell to Riverdale between 11:00 p.m. and midnight in Russell's 1998 Astro van. Craig testified that he and Russell were drinking and that they were with Craig's girlfriend, Robyn Reynolds, and a woman named LaShanda. While they were in the Pacesetter neighborhood of Riverdale, both girls eventually exited the van. Craig also testified that a silver SUV then backed into the front passenger side door of Russell's van. Craig testified that after the SUV hit the van, the driver of the SUV pulled up to the van as if he was going to stop, but when Russell exited his van, the SUV pulled away. Craig testified

that when the SUV pulled off, Russell yelled at Craig to hand him his pistol and then Russell reached into a glovebox on the floor of the van in between the two front seats. Craig testified that he saw Russell pull out a black nine millimeter pistol and point it at the SUV. Craig testified that Russell then drove off after the SUV and gave chase. Craig testified that Russell caught up with the SUV, and as the van was still moving, Craig jumped out of the van.

Craig testified that he reported the hit-and-run, and then Craig heard gunshots that sounded like they were coming from Halsted Street, a block away. Craig testified that he returned to Reynold's house where he and Russell left Reynolds and LaShanda. Craig, Reynolds, LaShanda and another woman from across the street walked down the street to see what was happening. After about twenty minutes, Russell pulled up to the group in his brother's gray Monte Carlo car. Craig testified that Russell told them that the SUV he was chasing ran into a tree and asked them if they wanted to see it. The group got into Russell's brother's car and travelled to 128th and Halsted, where Russell stopped and exited the car because he was being followed by a man named Steve Green. Craig testified that after Russell returned to the car, LaShanda and Reynolds, the two women who were riding with them, were dropped off in the Pacesetter neighborhood. Craig testified that he and Russell rode to Russell's grandmother's house at 139th and Dearborn and retrieved Russell's van.

LaShanda Robinson

LaShanda Robinson testified that on July 18, 2000, Russell and Gregory Craig picked her up at

her house and she rode with them to her friend, Robyn Reynold's house. When they arrived at Reynold's house, Craig exited the van and Robinson remained in the van talking to Russell. Robinson testified that Russell took a black gun out of the glove compartment and showed it to her. Robinson testified that she told Russell to put the gun away and he placed it into a glove compartment between the passenger's and driver's seats. Robinson testified that she then exited the van and Craig got back into the van. Robinson saw a truck from across the street back out and hit Russell's van. Robinson testified that after the truck hit Russell's van, Russell got out of his van and appeared to be angry as he inspected the damage to the passenger's side of the van. Robinson testified that she believed at that point, Russell asked Craig for his gun. Robinson testified that Russell got back into his van as the SUV was pulling away, and that Russell followed the SUV and then came back past where Robinson and Robyn were standing again, behind the truck. Robinson testified that she thought that she heard gunshots after the SUV and Russell's van passed.

Robinson testified that she, Reynolds, and Washington, a neighbor from across the street, began walking and they met Craig. Washington was then picked up by a man named Steve Green and the two drove away. While Craig, Robinson, and Reynolds stood on the street, Russell drove up in a gray car and asked them if they wanted to see the crash. They got into the car. Robinson testified that when she asked Russell if he had shot anyone, he responded no. When they got to 128th and Halsted, Russell got out of the car and had a conversation with Steve Green. When Russell finished the conversation, he drove to his house on Dearborn,

where they got out of the gray car and into Russell's van. Robinson testified that Russell dropped her and Reynolds off at a recreation center near Reynolds's home.

Towanda Washington

Towanda Washington testified that on July 18, 2000, she lived on 136th Street in Riverdale, and that around midnight she was home with her friends, Raashawn, Reginald, Aletra, Latoya, and Tiffany. Washington testified that after staying for a half hour, the group left in Raashawn's SUV. Washington testified that as the SUV backed out of her driveway, it crashed into the side of an Astro van that was parked across the street. Washington identified Russell in court as the person that she saw saying in a "mad voice" that somebody had hit his van and to get his gun. Washington testified that Russell said to get his gun to a male who was across the street and that the male passed the gun to Russell. Washington testified that Raashawn pulled off in his SUV and that Russell followed him in the van. Washington testified that she saw the SUV and the van go north on 136th Street and then saw both vehicles coming back in the other direction. Washington testified that she walked across the street to Reynolds' house and that she, Robinson and Reynolds began walking toward 136th Street. As they walked, Gregory Craig approached them. Washington testified that she then got into a car with Steve Green and rode with him until he stopped at about 127th Street and had a conversation with Russell, who was at that time driving a gray car.

Washington testified that when she asked Russell what happened on 120th Street, Russell told

her that it was just an accident. Washington got back into Steve Green's vehicle and he drove her to 120th and Halsted, where he dropped her off. Washington testified that as she walked along 120th Street, she saw her friends, Latoya and Tiffany, who told her that Aletra had been shot in the head.

Reginald Tracy

Reginald Tracy testified that on July 18, 2000, he went out with Raashawn Langford, Aletra Slack, and Shivone Langford to celebrate his birthday. Tracy testified that Raashawn drove the group in his SUV to Washington's house on 138th Street in Riverdale. Tracy testified that they arrived at Washington's house around midnight and stayed for fifteen or twenty minutes. As they left Washington's house, Tracy sat in the back seat with his girlfriend, Aletra Slack. Tracy testified that Raashawn backed into a mini Astro van that was parked directly across the street from the driveway. As Raashawn drove away, the van chased him, ultimately heading towards 138th and Halsted. Tracy testified that as they traveled along Halsted Street, one gunshot hit Aletra in the head. The van continued to chase Raashawn's SUV and Reginald heard approximately twelve more gunshots. Tracy testified that the van continued to chase them and that more gunshots were fired until the SUV crashed into a tree at 120th and Wentworth. Tracy testified that after the SUV crashed, the van pulled up and stopped briefly and then drove away. Tracy testified that he, Raashawn, and Shivone exited the SUV, and that be pulled Aletra out of the vehicle and called for help.

Shivone Langford

Shivone Langford testified that on July 19, 2000, Shivone went to Washington's house in Raashawn's SUV with Raashawn, Tracy, and Aletra. Shivone testified that as they left Washington's house and were backing out of the driveway, Raashawn's SUV hit an Astro van that was parked across the street. Raashawn opened the door of his SUV, but did not get out after the accident and pulled away. Shivone testified that the van that Raashawn hit followed them, and that when they got to the area of 138th and Halsted, she heard a gunshot, followed by about fifteen more gunshots between 138th and 107th streets. Shivone testified that Raashawn drove to the area of 120th and Wentworth, where he crashed the SUV into a tree. After the crash, Shivone got out of the vehicle and saw the van pull up along side of her. It was at that time that Shivone saw the driver of the van, and identified Russell in court as the person that she saw driving the van.

Raashawn Langford

Raashawn Langford testified on July 18, 2000, he went to Washington's house with Shivone, Tracy, and Aletra in his silver SUV. Raashawn testified that as he left the house and was backing down the driveway, he collided with a van that was parked behind him. Raashawn testified that after he hit the van, he opened his window and observed the driver of the van get out to look at the damage. Raashawn testified that the passenger in the van raised his hand with a gun and then put it on the dashboard. Raashawn testified that he drove off to get away and that the van followed him. Raashawn testified that

as he drove, he saw the passenger in the van get out of the van through the sliding door. Raashawn testified that when he got to Halsted Street, a gunshot was fired through the back of his SUV and that after a few seconds, six to eight more shots followed. The van followed Raashawn to 107th and Halsted, and more gunshots were fired. Raashawn testified that he attempted to get to a hospital because Aletra had been shot in the head, but when he got to 120th and Wentworth, he slid on the wet pavement and crashed into a tree. Raashawn testified that he saw two men drive past in the van after he hit the tree, but that he was not able to identify them.

Jury Instructions & Verdict

Prior to closing argument, the State asked the trial court to give the jury an Illinois Pattern Jury Instruction, Criminal (IPI Criminal) 5.03 instruction on accountability. Based upon the evidence presented during trial that another passenger may have been in the van, the trial court allowed the instruction over defendant's objection. The instruction provided:

> "A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of the offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of the offense.
>
> The word "conduct" includes any criminal act done in furtherance of the

planned and intended act." Illinois Pattern Jury Instructions, Criminal, No. 5.03 (4th ed. 1992).

The trial court also gave the jury IPI Criminal 3.15 instruction on identification testimony. The instruction provided as follows:

> "When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:
>
> The opportunity the witness had to view the offender at the time of the offense, or the witness's degree of attention at the time of the offense, or the witness's earlier description of the offender, or the level of certainty shown by the witness when confronting the defendant, or the length of time between the offense and the identification confrontation." " Illinois Pattern Jury Instructions, Criminal, No. 3. 5 (4th ed. 1992).

On January 27, 2004, after deliberation, the jury found Russell guilty of one count of murder and three counts of attempted murder. On February 27, 2004, Russell filed a motion to reconsider or in the alternative a motion for new trial. The motion was denied. On March 8, 2004, Russell was sentenced to concurrent prison terms of 30 years for the murder conviction and three 15-year sentences for the attempted murder convictions.

ANALYSIS

Motion to Suppress Identification

Russell raises three arguments concerning the motion to suppress his identification in his pretrial police lineup. Russell contends that his motion to suppress the identification should have been granted because (1) his arrest was illegal and the identification was therefore the fruit of the poisonous tree; (2) he was denied his right to counsel during the police lineup; and (3) the police lineup was unduly suggestive because of the weight and height disparities between him and the other participants in the lineup and because he was the only participant in the lineup instructed to hold his number up. We review each argument below.

(A) The Arrest

First, Russell contends that his identification in the police lineup should be suppressed because it was the product of an illegal arrest. Russell argues that he voluntarily went to the police station to answer questions in an ongoing investigation and that when he arrived at the police station he was arrested. The State argues that Russell raised the legality of his arrest for the first time on appeal, therefore, Russell has waived this issue for review by failing to file a motion to quash arrest in the trial court. Alternatively, the State argues that even if a motion to quash arrest had been filed, the officers had probable cause to arrest Russell for murder and attempted murder.

A finding of probable cause to arrest will not be disturbed absent clear error, with due deference given to the trial court and arresting officers. *People*

v. Robinson, 299 Ill. App. 3d 426, 430-31 (1998), citing *Ornelas v. United States*, 517 U.S. 690, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996). A *de novo* review applies where the defendant files a motion to quash arrest and suppress evidence and the facts supporting the judge's ruling on that motion are undisputed. *Robinson*, 299 Ill. App. 3d at 431, citing *Ornelas*, 517 U.S. at 696-98, 134 L. Ed. 2d at 919-20,116 S. Ct. at 1661-62. However, we must first determine whether Russell's claim has been waived, barring review by this court. We note that Russell did not file a motion to quash arrest in the trial court. As such, Russell has arguably waived the issue for review; however, a reviewing court may ignore the waiver rule in order to reach a just result. *Robinson*, 299 Ill. App. 3d at 431, citing *People v. Hoskins*, 101 Ill. 2d 209, 219 (1984). Accordingly, we will review this issue.

Section 107-2 of the Code of Criminal Procedure provides that a valid arrest may be made when there are reasonable grounds to believe that the person to be arrested has committed a crime. 725 RCS 5/107-2 (West 2000). "Reasonable grounds" is synonymous with "probable cause." *Robinson*, 299 Ill. App. 3d at 431, citing *In re D. G.* 144 Ill. 2d 404 (1991). In determining whether probable cause existed to effectuate a warrantless arrest, a court must look to the totality of the circumstances and make a practical, commonsense decision whether there was a reasonable probability that an offense was committed and that the defendant committed it. *Robinson*, 299 Ill. App. 3d at 431, citing *People v. Tisler*, 103 Ill. 2d 226, 236-37 (1984). Mere suspicion is inadequate to establish probable cause to arrest, but evidence relied upon by arresting officers need not be sufficient to prove guilt beyond a reasonable

doubt or even be admissible at trial. *Robinson*, 299 Ill. App. 3d at 431, citing *People v. Wilson*, 260 Ill. App. 3d 364 (1994). The determination, which considers only information available to officers before the arrest, must focus on the factual considerations upon which reasonable, prudent people, not legal technicians, act. *Robinson*, 299 Ill. App. 3d at 431, citing *People v. Henderson*, 266 Ill. App. 3d 882 (1994). A general description of a suspect coupled with other specific facts and circumstances that would lead a reasonably prudent person to believe that the action taken was appropriate can constitute sufficient cause to arrest. *See Robinson*, 299 Ill. App. 3d at 431.

In this case, for the first time on appeal, Russell argues that he did not surrender himself to police; that he went to the police station because he knew the police were looking for him. Whether Russell went to the police station to surrender and turn himself in or to merely answer questions is of no consequence to the determination of whether he was legally arrested. We must determine whether Russell's arrest, once he was at the police station, was based upon a reasonable probability that he committed the offense. *See Tisler*, 103 Ill. 2d at 236-37; *Robinson*, 299 Ill. App. 3d at 431. Our review of the evidence reveals that Gregory Craig, Russell's friend and the passenger in Russell's van, told Sergeant Satriano on July 20, 2000, that Russell was the driver of the van and that Russell shot and killed Aletra Slack. Furthermore, at trial, Craig testified that he was in the van with Russell when Raashawn backed his SUV into the van at which point Russell demanded his gun and chased the SUV. Our review of the record reveals that after the murder, the police interviewed Craig, an eyewitness, who

provided the police with information about the events leading up to and after the shooting. We find, based upon the information known to the police at the time of their warrantless arrest of Russell, that they had sufficient information to believe that Russell committed Aletra's murder. Accordingly, the police had probable cause to arrest Russell, therefore, the arrest was legal. *See Robinson*, 299 Ill. App. 3d at 433.

(B) Right to Counsel at a Police Lineup

Now we must determine whether Russell's lineup identification should have been suppressed because the police failed to honor his lawyer's request that counsel be permitted to observe the lineup and the witness' identification. In essence, Russell contends that a person who is represented by counsel and who has agreed to take part in a lineup has a right, as a matter of due process, to have counsel present during the identification process. Russell argues that his attorney should have been present for the lineup because he was already being represented by counsel and because Detective Rolniak had signed an agreement to permit Adam, Russell's counsel, to view the lineup. The law in Illinois is clear that prior to the initiation of adversary proceedings, a person does not have a constitutional right to counsel when he takes part in a lineup. *People v. Bolden*, 197 Ill. 2d 166, 175 (2001). The sixth amendment right to counsel does not attach until the initiation of adversary proceedings against the person, whether by formal charge, preliminary hearing, indictment, information, or arraignment. *Bolden*, 197 Ill.. 2d at 175-76, citing *Moran v. Burbine*, 475 U.S. 412, 429-

30, 89 L. Ed. 2d 410, 426-27, 106 S. Ct. 1135, 1145-46 (1986); *Kirby v. Illinois*, 406 U.S. 682, 688-89, 32 L. Ed. 2d 411, 417, 92 S. Ct. 1877, 1881-82 (1972); *United States v. Wade*, 388 U.S. 218, 226-27, 18 L. Ed. 2d 1149, 1156-57, 87 S. Ct. 1926, 1931-32 (1967); *People v. Garrett*, 179 Ill. 2d 239, 247-48 (1997). Prior to the commencement of adversary proceedings, a person also does not possess a right to counsel under the fifth amendment. *Bolden*, 197 Ill.. 2d at 176. A person's appearance in a lineup is nontestimonial in nature and does not constitute interrogation; for these reasons, identification evidence stemming from a lineup does not implicate any fifth amendment concerns. *Bolden*, 197 Ill. 2d at 176, citing *Kirby*, 406 U.S. at 687-88, 32 L. Ed. 2d at 416-17, 92, S. Ct. at 1881; *Wade*, 388 U.S. at 221-23, 18 L. Ed. 2d at 1154-55, 87 S. Ct. at 1929-30; *People v. Nelson*, 40 Ill. 2d 146, 152 (1968).

Because Russell does not have a right to counsel at a police lineup prior to the commencement of adversary proceedings, we find that he was not entitled to have his attorney present for the lineup. *See Bolden*, 197 Ill. 2d at 175. Accordingly, we hold that Russell's right to counsel was not violated.

(C) Suggestive Lineup

Next, Russell argues that the trial court erred in denying his motion to suppress identification because the pretrial police lineup was suggestive. Russell contends that the lineup was suggestive because there were significant height and weight disparities between Russell and the other participants in the lineup. Russell also argues that the lineup was suggestive because he was the only participant in the lineup who was instructed to lift

his number up when it was sliding down. The State argues that Russell failed to meet his burden by establishing that the lineup was overly suggestive.

When challenging a pretrial identification, the defendant has the burden of proving that the identification procedures were so unnecessarily suggestive as to give rise to a substantial likelihood of irreparable misidentification. *People v. Simpson*, 172 Ill. 2d 117, 140 (1996). An identification should be suppressed when it is so unnecessarily suggestive that there is a substantial likelihood of misidentification. *People v. Peterson*, 311 Ill. . App_ 3d 38, 48 (1999), citing *People v. Hartzol*, 222 Ill. App. 3d 631, 642 (1991). Courts must look to the totality of the circumstances in evaluating this claim. *Neil v. Biggers*, 409 U.S. 188, 196, 93 S. Ct. 375, 380, 34 L. Ed. 2d 401, 409 (1972); *Simpson*, 172 Ill. 2d at 140. A trial court's ruling on a motion to suppress will not be set aside unless manifestly erroneous. People v. Stewart, 105 Ill. 2d 22, 41 (1984).

In the instant case, at the time of the lineup, Russell was five feet, eleven inches tall and 270 pounds. Detective Rolniak testified that of the other participants in the lineup, three were six feet tall, one was five-foot-ten, and another was six-foot-five, and one weighed 205 pounds, two participants weighed 215 pounds, one was 220 pounds, and another participant was 330 pounds. Russell testified at the motion to suppress hearing that there were at least two or three other participants in the lineup that were "about" his size. The record also indicates that Russell testified that the participants in the lineup were seated on a bench during the lineup. Furthermore, Shivone, Higgenbottom, and

Washington positively identified Russell at the lineup, two days after the car chase and shooting. We note that Shivone was able to distinguish the men in the lineup because she specifically identified one participant as someone she knew from the neighborhood, but identified Russell as the person she saw at the scene of the Wentworth crash. After hearing all the evidence presented at the motion to suppress hearing, the trial court found that the difference in weight was not suggestive.

We note that all members of a lineup need not be physically identical. *Simpson*, 172 Ill. 2d at 140; *Richardson*, 123 Ill. 2d at 350; *People v. Kelley*, 304 Ill. App. 3d 628, 637-38 (1999); *Bragg*, 277 Ill. App. 3d at 474. Any differences in appearance goes to the weight of the identification, not to its admissibility. *Peterson*, 311 Ill. App. 3d at 49, citing Kelley, 304 Ill. App. 3d at 638; *People v. Johnson*, 222 Ill. App. 3d 1, 7-8 (1991); *People v. Trass*, 136 Ill. App. 3d 455, 463 (1985). In this case, Russell testified that there were two or three participants in the lineup that were similar in size - to him. And after reviewing the record, we do not find that the differences in height and weight were such as to render the identification procedures unnecessarily suggestive. *People v. Polk*, 143 Ill. App. 3d 698, 702-03 (1986) (police lineup not suggestive where three lineup participants were 6'2", 5'10", and 67", weighing, respectively, 235, 185, and 215 pounds, and the defendants were 5'9", 185 pounds and 5'11", 185 pounds); *People v. Williams*, 96 Ill. App. 3d 958, 962-63 (1981) (discrepancies in height and weight did not render the lineup suggestive). Furthermore, we find that because the participants were seated during the lineup, any disparities in height were mitigated. *See Bolden*, 197 Ill. 2d at 170. Moreover, the witnesses identification

of Russell was positive and unwavering. *Polk*, 143 Ill. App. 3d at 703; *Williams* 96 Ill. App. 3d at 963. Consequently, we find that the trial court's ruling on the motion to suppress was not manifestly erroneous. *See Stewart* 105 Ill. 2d at 41.

Russell, however, contends that the lineup was suggestive because Sergeant Satriano instructed him to hold his number up when it was coming down. Our review of the record indicates that Lieutenant Amsden testified that the police would routinely address a suspect in a lineup when his number dropped below his chin. We note that Russell does not argue that his number was not falling when Sergeant Satriano addressed him; rather, Russell argues that Sergeant Satriano drew attention to him when he instructed him to lift his number up. We also note that Detective Rolnialc testified that he spoke to each witness before the lineup, that he gave each witness the same information, and that he kept the witnesses who were viewing the lineup separated. Considering the totality of the circumstances, we hold that the lineup simply was not unduly suggestive and that the trial court's ruling on the motion to suppress was not manifestly erroneous. *See* Stewart, 105 EL. 2d at 41.

2. Sufficiency of the Evidence

Russell argues that the evidence was insufficient to prove his guilt beyond a reasonable doubt. Russell maintains that the State's case consisted of circumstantial evidence; that there was no physical evidence which placed him at the crime scene; that only one eyewitness, Shivone Langford, identified Russell at the scene of the Wentworth accident; and that the witnesses' testimony was not

credible. The State argues that the evidence introduced at trial, when viewed in the light most favorable to the State, proved Russell's guilt beyond a reasonable doubt. The State also argues that the jury was the finder of fact, they heard the testimony and weighed the evidence, and the jury, not the court, properly weighed the credibility of the witnesses and found that the State's witnesses were credible.

When a defendant challenges the sufficiency of the evidence, the issue presented is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781, 2789 (1979); *People v. Collins*, 106 Ill. 2d 237, 261(1985); *People v. Slayton*, 363 Ill. App. 3d 27, 31 (2006). When considering a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000), citing *People v. Digirolamo*, 179 Ill. 2d 24, 43 (1997). The determination of the credibility of witnesses and the weight to give their testimony are issues for the fact-finder to decide and the fact-finder's conclusions are entitled to great deference. *People v. Cunningham*, 212 Ill. 2d 274, 279-80 (2004). Only where the evidence is so improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt will a conviction be set aside. *Hall*, 194 Ill. 2d at 330; *People v. Brown*, 185 Ill. 2d 229, 247 (1998).

Furthermore, we note that circumstantial evidence is sufficient to sustain a criminal

conviction, provided that such evidence establishes the elements of the offense charged beyond a reasonable doubt. *Hall*, 194 BL. 2d at 330; *People v. Gilliam*, 172 Ill. 2d 484, 515 (1996). The trier of fact need not, however, be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. *Hall*, 194 Ill. 2d at 330. It is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *Hall* 194 Ill. 2d at 330, citing *People v. Jones*, 105 Ill. 2d 342, 350 (1985).

Our review of the record indicates that evidence presented at trial established that Gregory Craig, a passenger in Russell's van, testified that he was seated in Russell's van when Raashawn's SUV backed into the van. Craig testified that Russell told him to give him his gun. Robinson, who was with Russell moments before the accident, testified that Russell showed her his gun earlier that evening and that she saw him place it in his glove compartment. Robinson also testified that after the accident Russell asked Craig for his gun and Craig testified that Russell reached into the glove compartment to get it. Washington also testified that after the accident, she heard Russell tell someone to give him his gun. Craig also testified that he was in Russell's van as Russell chased Raashawn's SUV. Although Craig jumped out of Russell's moving van and did not testify to shots being fired, Tracy testified that he was in Raashawn's SUV and heard approximately twelve gunshots being fired from Russell's van. Tracy testified that one of those gunshots struck Aletra Slack in the head. The record indicates that the car chase continued until Raashawn crashed his SUV into a tree on Wentworth Avenue. Shivone testified that once the SUV crashed she saw the van

that was chasing them drive by and she identified Russell as the driver of the van.

Our review of the record indicates that four witnesses — Craig, Robinson, Washington, and Raashawn heard Russell demand his gun after Russell backed his SUV into his van. Six witnesses testified that the van chased Raashawn's SUV: Craig, Robinson, Washington, Tracy, Shivone, and Raashawn. Tracy, Shivone, and Raashawn testified that as they were being chased in Raashawn's SUV by the van, they were fired upon. Shivone testified that when the SUV crashed into a tree at Wentworth, she saw Russell driving the vehicle. Furthermore, Shivone was able to identify Russell at the police-line up. After reviewing the record and considering all of the evidence, we hold that the evidence presented at trial established that Russell was guilty of the crimes with which he was charged. *See Hall*, 194 Ill. 2d at 330; *Jones*, 105 Ill. 2d at 350.

Russell, however, argues that the State's case was based solely on Shivone's identification of Russell at the scene of the Wentworth accident. Russell argues that Shivone's identification testimony is unreliable because she was the only witness to from the Wentworth accident to identify him; she did not testify to seeing Russell with a gun; and she testified that she was shaken, dazed, and vomiting after the accident. This case is similar to Slayton, where the court noted that "[t]he identification of defendant by a single witness is sufficient to sustain a conviction despite testimony to the contrary, provided the witness is credible and observed defendant under circumstances that would permit a positive identification to be made. "*Slayton*, 363 Ill. App. 3d at 31. In this case, Shivone testified

no less than two times that she was able to see the face of the driver of the van. She identified Russell as the offender at trial, as well as at the police lineup. It was for the jury to determine whether Shivone was a credible witness. *See Cunningham*, 212 Ill. 2d at 279-80. Accordingly, when viewed in die light most favorable to the State, Shivone's testimony, coupled with the other eyewitnesses' accounts, is sufficient to support a guilty verdict. *See Jackson*, 443 U.S. at 319, 61 L. Ed. 2d at 573, 99 S. Ct. at 2789; *Collins* 106 Ill. 2d at 261; *Slayton*, 363 Ill. App. 3d at 31.

3. IPI Criminal 3. 15

Next, Russell claims the trial judge erred when he gave the jury instruction on eyewitness identification and read the bracketed word "or" in IPI Criminal 3.15. Russell argues that, under *People v. Gonzalez*, 326 Ill. App. 3d 629 (2001), the trial court improperly modified IPI Criminal 3.15 by placing the word "or" in between each factor the jury could consider when determining the reliability the witnesses' identification. The State argues that Russell did not properly preserve this issue and it is therefore waived. The State further argues that in reviewing this issue under plain error, the error was harmless because the evidence in this case was not closely balanced.

Our review of the record indicates that Russell did not object to the issue at trial and it was not included in his post trial motions. Consequently, we find that Russell has waived this issue. *People v. Smith*, 362 Ill. App. 3d 1062, 1084 (2005) (error in instructing jury as to IPI Criminal 3.15 was waived because the defendant failed to object to this

instruction during the jury instructions conference or include the issue in his post trial motions). However, in finding that this issue has been waived, we also note that the trial court improperly read the instruction. Our review of the record reveals that the instruction as given contained an "internal inconsistency" and was, thus, both "ambiguous and misleading. " *See People v. Herron*, 215 Ill. 2d 167, 191 (2005). The Illinois Supreme Court in Herron determined that "giving IPI Criminal No. 3.15 with the 'ors' is indeed plain error. "*Herron*, 215 Ill. 2d at 191. In addition, the comments to IPI Criminal 3.15 in the 2003 supplement inform the trial court that the "or" (or the "and") between the factors is not to be read to the jury or included in the typed version given to the jury. IPI Criminal 4th ed No. 3.15, Committee Note, at 2 (Supp. 2003).

Although we review this issue under plain error, the seriousness of the risk of an improper conviction due to the erroneous reading of "or" in the instruction "depends upon the quantum of evidence presented by the State against the defendant. "*Herron*, 215 Ill. 2d at 193. The error is harmless where the evidence was not closely balanced and the erroneous instruction was not emphasized to the jury. *People v. Sims*, 358 Ill. . App. 3d 627, 638 (2005); compare *People v. Gonzalez*, 326 Ill. App. 3d 629, 640 (2001) (reversal was warranted because the evidence was closely balanced and the instruction was unduly stressed by the prosecutor in closing argument).

In this case, although we find that the instruction as given constituted plain error, Russell has failed to establish that the error was prejudicial. As we have already discussed, there was sufficient

evidence presented at trial to find Russell guilty. Therefore, we cannot say that the evidence was closely balanced or that the outcome of this case would have been different had the instruction not included the "ors. " *See* Herron, 215 Ill. 2d at 193 (stating that the "seriousness of the risk" that the error prejudiced the defendant "depends on the quantum of evidence presented by the State against the defendant"); see also *People v. James*, 348 Ill. App. 3d 498, 511 (2004) (finding instruction was plain error, but did not prejudice defendant); *People v. Mercado*, 333 Ill. App. 3d 994, 1000 (2002) (finding instruction was plain error, but did not prejudice defendant); *People v. Furdge*, 332 Ill. App. 3d 1019, 1031-32 (2002) (finding instruction was plain error, but did not prejudice defendant). Consequently, reversal is not warranted in this case.

4. IPI Criminal 5.03

Finally, Russell argues the trial court erred in giving an accountability instruction to the jury. Russell argues that there is no evidence to support the submission of an accountability instruction (IPI Criminal 5.03), and he argues that there was nothing to indicate that he was in any way connected with any other individual. Russell emphasizes that there was no testimony that he solicited anyone's aid to commit the crime. The State, however, argues that there was at least some evidence from which the jury could have reasonably concluded that another participant might have been involved in the shooting, and therefore, a jury instruction on accountability was warranted.

In Illinois, a person is legally accountable for another's criminal conduct when "[e]ither before or

during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. " 720 ILCS 5/5-2 (c) (West 2000). Moreover, WI Criminal 5. 03 contemplates this situation and provides:

> "A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of [(an) (the)] offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of [(an) (the)] offense.
>
> [The word 'conduct' includes any criminal act done in furtherance of the planned and intended act.]" Illinois Pattern Jury Instructions, Criminal, No. 5.03 (4th ed. 1992).

Even the slightest evidence in support of a theory of accountability warrants giving the jury an accountability instruction. People v. Reatherford, 345 Ill. App. 3d 327, 343-44 (2003); *People v. Testa*, 261 Ill. App. 3d 1025, 1030 (1994). Some evidence on accountability, along with evidence that the defendant acted as a principal offender, is adequate to support instructions on both-principal action and accountability, regardless of whether both theories were advanced in the State's case in chief. *Reatherford*, 345 Ill. App. 3d at 344; *Testa*, 261 Ill. App. 3d at 1030. Furthermore, accountability instructions may be given even though the defendant

is on trial alone. *Reatherford*, 345 App. 3d at 344; *Testa*, 261 Ill. App. 3d at 1030.

In this case, the State presented evidence that Craig was the passenger in Russell's van when Raashawn backed his SUV into the van. Craig and Robinson testified that Craig was a passenger in Russell's van. Craig testified that Russell took his black gun out of his glovebox. Robinson, however, testified that she heard Russell ask Craig to pass him his gun. Raashawn testified that he saw the passenger, Craig, hold a gun and place it on Russell's dashboard. Thus, the State presented evidence of Russell's direct participation in the charged offense along with circumstantial evidence that he aided another in its commission. Accordingly, based on the evidence, we hold that the trial court did not abuse its discretion in instructing the jury on accountability. *Reatherford*, 345 Ill. App. 3d at 344, citing *Reeves*, 314 Ill. App. 3d at 488 (the trial court's giving of accountability instruction will not be disturbed absent an abuse of discretion).

Moreover, a defendant's claim of improper jury instructions is reviewed under a harmless-error analysis: *Reatherford*, 345 Ill. App. 3d at 344, citing *People v. Dennis*, 181 Ill. 2d 87, 95 (1998). "[W]hen a jury is improperly instructed regarding the principles of accountability, a new trial is not warranted if the evidence is sufficient to find the defendant guilty beyond a reasonable doubt as a principal. " *Reatherford*, 345 Ill. App. 3d at 344, quoting *People v. Amaya*, 321 Ill. App. 3d 923, 929 (2001). As discussed earlier, there was sufficient evidence to support a guilty verdict based on Russell acting as a principal. Accordingly, even if there was an error, we hold that any error was harmless and a

new trial is not required. *See Reatherford*, 345 Ill. App. 3d at 344.

For the foregoing reasons, the convictions and sentences of the trial court are affirmed.

Affirmed.

NEVILLE, J., with CAMPBELL J., and MURPHY, J., concurring.

104042

[Court Stamped]
SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD 62701

March 28, 2007

Mr. Timothy A. Duffy
Kirkland & Ellis, LLP
200 E. Randolph Drive
Chicago, IL 60601

No. 104042 - People State of Illinois, respondent, v. Walter Russell, Petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on May 3, 2007.

[SEAL OF THE SUPREME COURT]

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

July 6, 2007

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In re: People State of Illinois, respondent, v. Walter Russell, petitioner. No. 104042

Today the following order was entered in the captioned case:

Motion by petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Motion Denied.

Order entered by the Court.

Very truly yours,

/s/ Juleann Hornyak

Clerk of the Supreme Court

cc: Hon. Lisa Madigan
Hon. Richard A. Devine